JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Wed Dec 10 16:21:23 2014

Dawama Sdn Bhd v Mohd Fadel bin Yusof & Ors

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO 24NCC-31–01 OF 2013
WONG KIAN KHEONG JC
9 JULY 2014

Civil Procedure — Intervener — Right to intervene — Application to file originating summons to convene meeting of certain creditors — Application by previous employees to intervene in originating summons — Whether application to intervene necessary — Rules of Court 2012 O 15 r 6

The plaintiff company ('the applicant') had filed an originating summons ('OS') under s 176 of the Companies Act 1965 to, inter alia, convene a meeting of certain creditors of the applicant ('scheme creditors') identified in a proposed scheme of compromise ('compromise scheme') of the applicant's debts with the scheme creditors. In this application, 37 previous employees of the applicant ('proposed interveners') applied, inter alia, to intervene in the OS, based on O 15 r 6 of the Rules of Court 2012 ('ROC') and/or the court's inherent jurisdiction on the grounds that the proposed interveners had been employed by the applicant; and that the applicant had not paid salaries due to the proposed interveners.

Held, dismissing the application:

(1) The presence of the proposed interveners in the OS was not necessary to ensure that all matters in OS be effectually and completely determined and adjudicated within the meaning of O 15 r 6(2)(b)(i) of the ROC. There was no question or issue arising out of or relating to the compromise scheme as between the proposed interveners and the applicant in the context of O 15 r 6(2)(b)(ii) of the ROC. The dismissal of the application would not prejudice the proposed interveners as the compromise scheme would only binds the applicant and the scheme creditors but not the proposed interveners (see paras 6(a)(b) & 9).

(2) As the applicant had not paid salaries due to the proposed interveners, the court exercised its discretion under O 59 r 8(b) of the ROC to order costs of the application to be paid by the applicant to the proposed interveners (see para 25).

[Bahasa Malaysia summary

Syarikat plaintif ('pemohon') telah memfailkan saman pemula ('SP') di bawah s 176 Akta Syarikat 1965 untuk, antara lain, mengadakan suatu mesyuarat

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Wed Dec 10 16:21:23 2014

pemiutang-pemiutang tertentu pemohon ('pemiutang-pemiutang skim') yang dikenal pasti di dalam skim kompromi cadangan ('skim kompromi') terhadap hutang pemohon dengan pemiutang-pemiutang skim tersebut. Dalam permohonan ini, 37 bekas pekerja pemohon ('pencelah cadangan') memohon, antara lain, untuk mencelah dalam SP tersebut, berdasarkan atas A 15 k 6 Kaedah-Kaedah Mahkamah 2012 ('KKM') dan/atau bidang kuasa inherens mahkamah atas alasan bahawa pencelah-pencelah cadangan telah diambil bekerja oleh pemohon; dan bahawa pemohon tidak membayar gaji yang kena dibayar kepada pencelah-pencelah cadangan tersebut.

Diputuskan, menolak permohonan:

(1) Kehadiran pencelah-pencelah cadangan yang tersebut di dalam SP tidak diperlukan untuk memastikan bahawa kesemua perkara dalam SP ditentukan dengan berkesan dan sepenuhnya dan diputuskan dalam maksud A 15 k 6(2)(b)(i) KKM. Tidak terdapat persoalan atau isu yang berbangkit daripada atau berkaitan kepada skim kompromi seperti di antara pencelah-pencelah yang dicadangkan tersebut dan pemohon dalam konteks A 15 k 6(2)(b)(ii) KKM. Penolakan permohonan itu tidak akan memprejudis pencelah-pencelah cadangan memadangkan skim kompromi tersebut akan hanya mengikat pemohon dan pemiutang-pemiutang skim tetapi bukan pencelah-pencelah cadangan tersebut (lihat perenggan 6(a)(b) & 9).

(2) Memandangkan pemohon tidak membayar gaji yang kena dibayar kepada pencelah-pencelah cadangan, mahkamah menjalankan budi bicaranya di bawah A 59 k 8(b) KKM untuk memerintahkan kos permohonan ini dibayar oleh pemohon kepada pencelah-pencelah cadangan (lihat perenggan 25).]

Notes

For cases on right to intervene, see 2(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 4518–4520.

Cases referred to

Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals [2008] 2 MLJ 622; [2008] 2 CLJ 121, FC (refd)

Jin Lin Wood Industries Sdn Bhd & Ors v Mulpha International Bhd (No 2) [2005] MLJU 326; [2005] 7 CLJ 208, HC (refd)

Majlis Agama Islam Selangor v Bong Boon Chuen [2009] 6 MLJ 307, FC (refd)

Oriental Insurance Co Ltd, The v Reliance National Asia Re Pte Ltd [2008] 3 SLR 121, CA (refd)

PB Securities Sdn Bhd v Autoways Holding Bhd [2000] 4 MLJ 417, CA (distd)

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Wed Dec 10 16:21:23 2014

Legislation referred to

Companies Act 1965 ss 131B(1), (2), 176, (1), (5), (10), 218, 292
Companies Act (Cap 50, 2006 Rev Ed) [SG] s 210
Rules of Court 2012 O 15 r 6, O 15 rr 6(2)(b), 6(2)(b)(i), (ii), (3), O 59 r 8(b), O 92 r 4

Counsel was absent for the applicant.
Abdullah Abbas (The Law Offices of Bernard Francis & Assoc) for the proposed interveners.

Wong Kian Kheong JC:

FACTS

[1] The facts of this case in chronological order are as follows:

(a) on 15 March 2012, the plaintiff company ('the applicant') had filed an originating summons ('the OS') under s 176 of the Companies Act 1965 ('the CA') for, among others, this court to convene a meeting of certain creditors of the applicant ('the scheme creditors') identified in a proposed scheme of compromise ('the compromise scheme') of the applicant's debts with the scheme creditors;

(b) on 16 March 2012, the applicant obtained on an ex parte basis, among others, the following orders from this court (Mah Weng Kwai J (as His Lordship then was)):

(i) an order to convene a meeting of the scheme creditors (the scheme creditors' meeting); and

(ii) an order to restrain all proceedings against the applicant,

(c) on 10 January 2013, the scheme creditors' meeting was held and the compromise scheme had been approved by the scheme creditors; and

(d) on 29 January 2013, this court (Nallini Pathmanathan J) had, among others:

(i) approved the compromise scheme (court's approval); and

(ii) ordered that within seven days from the court's approval, a copy of the court's approval should be deposited by the applicant with the Registrar of Companies ('the ROC').

INTERVENTION APPLICATION

[2] By way of notice of application dated 13 June 2014 ('this application'), 37 previous employees of the applicant ('the proposed interveners') applied, among others, to intervene in the OS, based on O 15 r 6 of the Rules of Court

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Wed Dec 10 16:21:23 2014

2012 ('the RC') and/or this court's inherent jurisdiction.

[3] The proposed interveners advanced the following grounds to support this application:

(a) the proposed interveners had been employed by the applicant;

(b) the applicant had not paid salaries due to the proposed interveners;

(c) consequent to the court's approval, Utusan Printcorp Sdn Bhd ('UPSB') had taken over management and operation of the applicant;

(d) a statutory winding up notice under s 218 of the CA had been served on UPSB; and

(e) the Industrial Court had given an award in favour of one party (who was not one of the proposed interveners) against UPSB.

THE PROPOSED INTERVENERS WERE NOT THE SCHEME CREDITORS

[4] The compromise scheme clearly excluded the proposed interveners from being the scheme creditors. I produce the relevant part of the compromise scheme as follows:

> 3.3 Excluded Creditors
>
> The following Unsecured Creditors below ('Excluded Creditors') will not be settled under the [Compromise Scheme]:
>
> a. PREFERENTIAL CREDITORS:
>
> Preferential Creditors have been classified as the class of creditors which ranks in priority over other creditors in the event of a liquidation scenario pursuant to Section 292 of the Companies Act. *These creditors include the amount due to employees in terms of salaries/wages owed* and debts due and owing to government authorities such as the Inland Revenue Board and Employees Provident Fund and other regulatory bodies. (Emphasis added.)

ORDER 15 R 6(2)(B) OF THE RC DOES NOT APPLY IN THIS CASE

[5] Order 15 r 6(2)(b) and 6(3) of the RC provide as follows:

> 6(2) Subject to this rule, at any stage of the proceedings in any cause or matter, the Court may on such terms as it thinks just and either of its own motion or on application:
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> ...
>
> (b) order any of the following persons to be added as a party, namely:

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Wed Dec 10 16:21:23 2014

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(i) *any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon*; or

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(ii) *any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the Court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.*

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(3) An application by any person for an order under paragraph (2) adding him as a party shall, except with the leave of the Court, be supported by an affidavit showing his interest in the matters in dispute in the cause or matter or, as the case may be, the question or issue to be determined as between him and any party to the cause or matter. (Emphasis added.)

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[6] As the proposed interveners were not the scheme creditors under the compromise scheme, it is my considered view that the proposed interveners have no interest in the compromise scheme. Accordingly:

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(a) the presence of the proposed interveners in the OS is not necessary to ensure that all matters in OS be effectually and completely determined and adjudicated tipon within the meaning of O 15 r 6(2)(b)(i) of the RC; and

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(b) there is no question or issue arising out of or relating to the compromise scheme as between the proposed interveners and the applicant in the context of O 15 r 6(2)(b)(ii) of the RC.

[7] This case is contrasted with the Court of Appeal's case of *PB Securities Sdn Bhd v Autoways Holding Bhd* [2000] 4 MLJ 417, at p 421 where the respondent company's restructuring scheme recognised the appellant company as a scheme creditor.

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[8] In *Jin Lin Wood Industries Sdn Bhd & Ors v Mulpha International Bhd (No 2)* [2005] MLJU 326; [2005] 7 CLJ 208, at p 212, the High Court held that a company has the discretion to choose which creditor that company wishes to compromise the debt in question.

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[9] My decision to refuse this application does not prejudice the proposed interveners as the compromise scheme only binds the applicant and the scheme creditors (but not the proposed interveners) — the Singapore Court of Appeal's judgment in *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2008] 3 SLR 121, at p 150. Our s 176 of the CA is largely similar to (but not in pari materia with) s 210 of the Singapore's Companies Act ('the Singapore's

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JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Wed Dec 10 16:21:23 2014

CA'). Hence, Singapore cases on s 210 of the Singapore's CA, especially from its highest court (Court of Appeal) are persuasive.

[10] In *The Oriental Insurance Co Ltd*, the appellant company was a scheme creditor and had voted in favour of the restructuring scheme of the respondent company. After the restructuring scheme had obtained the requisite creditors' approval, the Singapore High Court approved that scheme. Subsequently, the appellant company failed to file its proof of debt ('POD') within time stipulated in the restructuring scheme. Accordingly, the appellant company applied to the Singapore court for an extension of time to file POD which was contrary to the time period specified in the restructuring scheme (which had already been approved by the Singapore High Court).

[11] In *The Oriental Insurance Co Ltd*, at pp 150–151, the Singapore's Court of Appeal in a judgment given by VK Rajah JA (now the present Attorney General of Singapore) held as follows:

> ... *once the court gives its approval to a scheme, the scheme is binding on all parties to the scheme, and the scheme cannot afterwards be altered, even if the shareholders and the creditors of the company acquiesce in the alteration* ... The binding nature of the court's sanction is so wide-reaching that if the court sanctions a scheme which is beyond the capacity of the company or in conflict with other statutory provisions, the scheme is nonetheless binding on the parties, notwithstanding that it is ultra vires the objects of the company
>
> ...
>
> *Nevertheless, the court retains an inherent jurisdiction to amend or set aside a scheme in limited circumstances, for instance, if consent to the scheme was obtained by fraud ... where there are obvious mistakes in the documents setting out the scheme* ... (Emphasis added.)

[12] In this case, court's approval has been granted. Hence, the above ruling in *The Oriental Insurance Co Ltd* applies to the compromise scheme which has the court's approval. Accordingly, the court has a very limited power to set aside a court approved scheme. In any event, as the proposed interveners are not scheme creditors, they have no locus standi to challenge or vary the compromise scheme which has the court's approval.

NO RESORT TO THE COURT'S INHERENT JURISDICTION

[13] This application is also premised on the court's inherent jurisdiction. As held above, the proposed interveners have failed to satisfy either limb of O 15 r 6(2)(b)(i) or (ii) of the RC.

[14] In *Majlis Agama Islam Selangor v Bong Boon Chuen* [2009] 6 MLJ 307, at p 320, the Federal Court held that the court's inherent jurisdiction cannot be

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Wed Dec 10 16:21:23 2014

A invoked to override the application of a specific rule in RC.

[15] As there are specific and detailed provisions in O 15 r 6(2)(b)(i), (ii) and 6(3) of the RC to be satisfied before the court allows any person to intervene in a pending proceeding, there should not be any resort to the court's inherent jurisdiction and/or O 92 r 4 of the RC. If this court allows any person to intervene in a pending cause or matter merely by exercising the court's inherent jurisdiction or by invoking O 92 r 4 of the RC, this will render redundant the specific and detailed provisions of O 15 r 6(2)(b)(i), (ii) and 6(3) of the RC.

C OS HAD BEEN CONCLUDED

[16] As explained above, court's approval has already been obtained. The OS has therefore been concluded. In such an event, there is nothing pending before this court and accordingly, there is no necessity for any party to intervene. I refer to the Federal Court's judgment in *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622; [2008] 2 CLJ 121 as follows:

(a) Abdul Hamid Mohamad CJ, at pp 637 (MLJ); 136, 142–144 and 153–154 (CLJ):

> *... an application for leave to intervene in order to set aside an order for sale by a party not already a party to the proceedings must be made under O 15 r 6 of the RHC 1980. The application may be made 'at any stage of the proceedings' meaning before judgment, otherwise the proceedings have concluded and there is no longer a proceeding in existence for the party to intervene in. The judge has also become functus officio. Even then, the application must be made promptly.* Order 15 r 6 of the RHC 1980 applies to all civil proceedings ... (Emphasis added.);

(b) Abdul Aziz FCJ, at p 660 (MLJ); 163 (CLJ):

> *... the addition of a party can only be made in a cause or matter that has not been concluded and brought to an end. The wording of para (b) (O 15 r 6(2)) would not enable a person to come in and be added as a party to undo what has already been done or decided in a cause or matter.* (Emphasis added.);

and

(c) Azmel FCJ, at pp 676 (MLJ); 163 and 190 (CLJ), agreed with Abdul Hamid Mohamad CJ.

[17] Based on the Federal Court's interpretation of O 15 r 6(2)(b) of the RC in *Hong Leong Bank Bhd*, this application cannot succeed as court's approval has already been granted.

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Wed Dec 10 16:21:23 2014

NO EXPLANATION FOR DELAY

[18] Section 176(5) of the CA provides that generally, the court's approval shall take effect from the date an office copy of the court's approval is deposited with ROC.

[19] Paragraph 2 of the court's approval (dated 29 January 2013) required the applicant to deposit an office copy of the court's approval with the ROC within seven days from the date of the court's approval. Assuming this had been done by the applicant, an office copy of the court's approval would have been deposited with the ROC at the latest, by 5 February 2013. As such, a company search of the applicant by the proposed interveners would have revealed the existence of the court's approval.

[20] The affidavit supporting this application ('affidavit') exhibited a copy of the court's approval. It is thus clear that the proposed interveners had actual knowledge of the existence of the court's approval. Nonetheless, this application was only filed on 13 June 2014, more than 16 months after 5 February 2013 ('delay').

[21] As held by Abdul Hamid Mohamad CJ in *Hong Leong Bank Bhd*, at p 154, a party intending to intervene in a proceeding must act promptly. The affidavit does not provide any explanation for the delay. Such an omission militates against this application.

[22] For proceedings under s 176 of the CA, the Court of Appeal in *PB Securities Sdn Bhd*, at p 425, held that the existence of the words 'in a summary way' in s 176(1) and (10) of the CA envisages that the OS should be disposed of expeditiously. In view of the summary nature of the OS under s 176 of the CA, I should not cause further delay by allowing this application.

THE PLAINTIFF'S INTERNAL MANAGEMENT

[23] As for the contention by the proposed interveners that UPSB has taken over the management and operation of the applicant, this is purely an internal matter for the applicant's board of directors ('BOD') (please see s 131B(1) and (2) of the CA) for which the BOD is answerable to the applicant's shareholders and not the proposed interveners.

CONCLUSION

[24] In view of the aforesaid reasons, regrettably, I have to decline this application.

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Wed Dec 10 16:21:23 2014

[25] As the applicant had not paid salaries due to the proposed interveners, I exercised my discretion under O 59 r 8(b) of the RC to order costs of this application to be paid by the applicant to the proposed interveners.

Application dismissed.

Reported by Afiq Mohamad Noor